RECEIVED
NOV 23 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

October 1982 TERM

No. 82-603

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

ROBERT EARL SAWYER,

Respondent.

RESPONDENT'S BRIEF IN REPLY TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

FAGAN AND SHEFFIELD
CHARLES EDWARD FAGAN, ESQ.
Attorneys for Respondent
606 Hotel Jamestown Office Bldg.
P.O. Box 1346
Jamestown, New York 14701
Telephone: (716) 664-3602

TABLE OF CONTENTS

	Page
Table of Cases.....	ii
Nature of Case.....	1
Statement of Facts.....	1-5
Reasons for Not Granting the Writ.....	6-9
Conclusion.....	9

TABLE OF CASES

	Page
Black v. Cutter Laboratories, 351 U.S. 292 (1956) rehearing denied 352 U.S. 859 (1956).....	6
Faretta v. California, 422 U.S. 816 (1975).....	7,8
Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945).....	6
People v. McIntyre, 36 N.Y.2d 10 (1974)	7, 8-9
People v. Mirenda, ____ N.Y.2d _____ (1982).....	7-8
People v. Shinkle, 51 N.Y.2d 417.....	9
Slappy v. Morris, 649 F.2d 71 (9th Cir. 1981).....	9
73 Harvard Law Review 1324 (1958).....	8

NATURE OF THE CASE

The Respondent, ROBERT EARL SAWYER, appealed to the Appellate Division, Fourth Department, State of New York, from a judgment of the County Court, County of Chautauqua, State of New York, rendered on the 30th day of October, 1978, convicting him of the crimes of Common-law Murder, 2nd Degree (Section 125.25(1) PL) and Felony Murder, 2nd Degree (Section 125.25(3) PL), after a jury trial before the Honorable Lee Towne Adams. The court sentenced the Respondent to an indeterminate term of twenty-five (25) years to life imprisonment. By order dated November 13, 1981, the Appellate Division, Fourth Department, reversed Respondent's conviction on the law and facts and ordered a new trial. The People of the State of New York, appealed to the New York Court of Appeals which by order dated July 2, 1982, affirmed the Appellate Division's order reversing the Respondent's conviction.

STATEMENT OF FACTS

The Respondent was indicted on two counts of 2nd Degree Murder and two counts of Robbery by the Chautauqua County Grand Jury resulting from an investigation into the shooting death of Miss Jeanne Humm at Hogan's Hut grocery store in Stow, New York on February 11, 1977. He was arraigned before the Chautauqua County Court Judge, Lee Towne Adams, on March 2, 1978. At that time, the Respondent did not have an attorney and received a one week adjournment for the purpose of retaining one. On March 9, 1978 the Respondent again appeared before Judge Adams, this

time with Charles Edward Fagan, Esq., as his spokesman. The Court inquired as to whether Mr. Fagan was Respondent's counsel. Mr. Fagan, rather than committing himself to such representation, explained that he had been retained by Defendant's family to pursue the representation question as it applied to Sawyer and requested an explanation from the court as to an apparent conflict of interest between the Chautauqua County Public Defender's office, the District Attorney's office and the particular case against the Respondent. The Chautauqua County Public Defender's office had recently undergone a change in top-level management, as Democratic-appointee Fagan was replaced by Republican-appointee, Richard V. Slater, Esq., on or about January 5th, 1978. Immediately prior to his appointment as Public Defender, Mr. Slater had been associated with the Chautauqua County District Attorney's office, as Chief Assistant District Attorney, and in the changeover had been privy to files and materials in the investigation resulting in the Defendant's indictment. Additionally, and importantly, Ronald J. Gibb, Esq., an Assistant Public Defender during the investigation stage who was also privy to Defendant's case material, had been transferred into the District Attorney's office.

Despite this changeover and blending of staff personnel, which created new allegiances and loyalties, the trial court ruled that no conflict existed because an earlier order by Adams disassociating Slater from the case had resolved the conflict. However, the Court offered neither the Respondent nor Mr. Fagan any explanation of that order. In fact, the actual order of

disassociation was never related to the Respondent in any form. The case was further adjourned.

On March 16, 1978, the Respondent and Mr. Fagan again appeared before Judge Adams and formally declared indigency, prompting the Court to assign Bruce K. Carpenter, Esq., in his capacity of an Assistant Public Defender to represent Sawyer. Still sensing a climate of unexplained conflicting interests and uncertain loyalties, the Respondent voiced his objection to being represented by the new Public Defender's office or anyone connected with it. Nevertheless, the case was adjourned with Mr. Carpenter listed as the attorney of record for Respondent.

On March 20, 1978 the Respondent again in open court requested assigned counsel and made strenuous objection to Mr. Carpenter or any Public Defender being made permanent counsel. He declared his incompetency in representing himself and requested the appointment of Mr. Fagan. Even Mr. Carpenter noted the Respondent's mistrust and lack of cooperation and suggested that the court appoint alternate counsel to follow the case and be present at all proceedings. The court denied these requests and the case was further adjourned.

Between court appearances the Respondent continued to refuse to cooperate with the Public Defender's Office or Mr. Carpenter, sending messages to Judge Adams stating that he did not really want their services. (Subsequent civil suits initiated by Respondent for privacy violations during this time have been settled out of court.)

On March 22, 1978, in response to the Respondent's statement "I cannot plead" (either guilty or not guilty), the Court declared the Respondent had waived his right to counsel, entered a not guilty plea on his behalf, and relieved Assistant Public Defender Carpenter as attorney of record.

Respondent went so far as to bring an Article 78 proceeding against Judge Adams in May 1978, seeking Appellate Division supervision and assignment of trustworthy counsel outside the Public Defender's office. This relief was denied on May 15, 1978, and Respondent was left without trained counsel.

Through all subsequent proceedings, including trial and sentencing, the Respondent refused Carpenter's assistance and requested counsel free from the perceived taint of conflict. On several occasions, without explaining the issue to the Respondent, the Court again ruled that a conflict of interest did not exist and refused to appoint former Public Defender Fagan or any other attorney to assist Respondent as an alternative to Mr. Carpenter. Throughout the proceedings Respondent asserted his own incompetence as well as his distrust of the Public Defender's staff under former Assistant District Attorney Slater.

During the trial itself, which commenced on October 3, 1978, and terminated on October 20, 1978, the Court made few attempts to minimize the prejudice resulting to Respondent from lack of professional assistance. While the Respondent was assisted with evidence discovery and granted an independent investigator, he was not kept fully advised on all the rules of evidence and proved

incapable of cross-examining witnesses or posing objections to improper or leading questions. He remained unaware of his right to assert the spousal privilege against the prosecution's key witness, Respondent's wife, Muchell Sawyer. His "Closing Argument", after presenting no case on his own behalf, was little more than a reiteration of his own incompetence and desire for trustworthy counsel. As noted above, he was found guilty on two counts of murder and sentenced to twenty-five (25) years to life imprisonment. Respondent appealed his conviction to the Appellate Division, Fourth Department, which reversed his conviction on the law and facts and granted a new trial. Said reversal was affirmed by the New York Court of Appeals.

REASONS FOR NOT GRANTING THE WRIT

State courts have the ongoing obligation of construing and applying the Federal Constitution and federal laws. While the Supreme Court is an appropriate arbiter of federal law, it is a well-settled practice of the United States Supreme Court not to review state decisions which have sufficient independent grounding in state law. (Black v. Cutter Laboratories, 351 U.S. 292, (1956) rehearing denied 352 U.S. 859 (1956)). This is a case grounded in New York State law, in spite of the fact that the People in their Petition for a Writ of Certiorari would make a federal case out of it. This most important, and most difficult limitation on Supreme Court review of state court decisions was well stated by Justice Jackson in 1945:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.*** The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the State Court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Herb v. Pitcairn, 324 U.S. 117, 125-126(1945).

For the reasons stated below, it is clear that New York has established an independent and adequate state ground on the issue of pro se representation.

It is significant that in 1974, one year before the United States Supreme Court espoused its own "eyes open" standard in pro se representation in Faretta v. California, 422 U.S. 816 (1975), the New York Court of Appeals decided People v. McIntyre, 36 N.Y.2d 10 (1974). The timing is significant because even before the Supreme Court spoke, New York began to develop its own body of law on the subject of pro se representation. Petitioner did not address McIntyre in its brief. McIntyre held that a defendant's exercise of the right to proceed pro se must be, inter alia, "knowing and intelligent." The Court in McIntyre went on to say that, "our Court need not reach the question of whether the right to defend pro se is founded in the Federal Constitution because the New York State Constitution and criminal procedure statute clearly recognize this right." Id. at 15. In People v. Sawyer, the case at bar, the same Court, citing both federal and state law, found such a knowing and intelligent election lacking when confronted with a unique situation: Can a defendant who rejects appointed counsel and desires alternate counsel be deemed to have knowingly and intelligently waived counsel when he is compelled to proceed pro se? The Court, relying on the New York rule, held in the negative and also found that "standby counsel" should have been appointed. The issue of "standby counsel" was recently addressed again by the Court of Appeals in People v. Mirenda, _____ N.Y.2d _____ (1982). In Mirenda, the Court once again cited both federal and state constitutional law and found that the defendant knowingly and intelligently

elected to proceed pro se and that as a result there was no right to standby counsel.

Obviously the issues and side issues surrounding pro se representation abound. The High Court was arguably aware of this hodgepodge when it announced its "eyes open" standard for pro se representation in Faretta v. California. That standard is now attacked on the grounds of "vagueness." If indeed it is vague, there was wisdom in that vagueness for no court could reasonably foresee the vast array of situations in which a defendant might elect or be compelled to proceed pro se. The "eyes open" standard should be construed as a minimally acceptable guidepost for state court decisions on the subject of pro se representation. Certainly the Supreme Court has often recognized that reversal of state decisions grounded in state law do nothing more than increase litigation. As early as 1954, it was reported that in 11 terms, some 46 Supreme Court reversals of state decisions required additional litigation. "In slightly less than half of these cases the party successful in the Supreme Court was unsuccessful in the State Court following the remand." Note, "Congressional Reversal of Supreme Court Decisions, 1945-1957," 73 Harvard Law Review 1324 (1958). A hands-off policy is a wise practice since a reversal of state determinations of state issues frequently results in additional litigation without affecting the final outcome of cases.

McIntyre and its progeny clearly demonstrate independent and adequate New York State grounds on the issue of pro se representation. However, assuming arguendo that the High Court fails

to find an independent state ground, certiorari should still be denied on the grounds that this line of cases points out something equally significant: They demonstrate the explosive and controversial side issues associated with pro se representation, i.e., choice of counsel, standby counsel, and conflict of interest issues (See People v. Shinkle, (51 N.Y.2d 417), a decision resting on New York case law). These issues, like pro se representation, are often uniquely state grounded and are therefore better dealt with by the States. (Note: The issue of choice of counsel will be addressed in part by the Supreme Court this term in Slappy v. Morris, 649 F.2d 71 (9th Cir. 1981), a far better case than Sawyer to deal with such an issue.)

CONCLUSION

The People would ask the Court to set mandatory and impractical guidelines in an area necessitating discretion. This Court would be ill advised to enter an area so volatile and controversial. The decision to order choice of counsel, standby counsel, or pro se representation is better left to the States where various facts and unclear records can be more effectively deciphered.

Dated: November 18, 1982

Respectfully submitted,

FAGAN AND SHEFFIELD
CHARLES EDWARD FAGAN, of counsel
Attorneys for Respondent
Office and Post Office Address
606 Hotel Jamestown Office Building
P.O. Box 1346
Jamestown, NY 14701
(716) 664-3602

RECEIVED
NOV 22 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

October 1982 TERM

No. 82-603

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

ROBERT EARL SAWYER,

Respondent.

Motion for Leave to Proceed In Forma Pauperis

FAGAN AND SHEFFIELD
CHARLES EDWARD FAGAN, ESQ.
Attorneys for Respondent
606 Hotel Jamestown Bldg.
P.O. Box 1346
Jamestown, NY 14701
Telephone: (716) 664-3602

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-603

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

ROBERT EARL SAWYER,

Respondent.

Affidavit in Support of Motion for Leave to Proceed In Forma Pauperis

STATE OF NEW YORK)
)SS.:
COUNTY OF Wyoming)

I, Robert Earl Sawyer, being duly sworn, depose and say:

1. That I am the Respondent in the above action which is a proceeding wherein the Petitioner is seeking a Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

2. That throughout the lower court proceedings I was indigent and therefore unable to retain counsel to represent me in said proceedings. Consequently, I received assistance of assigned counsel at both New York State appellate levels pursuant to court order.

3. That since I remain incarcerated, I am still unable to retain counsel and, therefore, seek this motion to proceed in forma pauperis in the above proceedings.

4. That I am not employed; nor have I received any income within the past 12 months from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources; nor do I have any cash or checking or savings accounts; nor do I own any real estate, stocks, bonds, notes, or other valuable property.

5. That because of my poverty I am unable to pay any of the costs of the above proceeding and therefore request that I not be required to prepay fees, costs of give security therefor.

6. That I understand that a false statement herein will subject me to penalties for perjury.

Robert E Sawyer

ROBERT EARL SAWYER

Sworn to before me this

16 day of November, 1982.

William L. Reed

NOTARY PUBLIC

WILLIAM L. REED
Notary Public, State of New York
No. 60-[illegible] in Cayuga County
[illegible] Expires March 30, 19[illegible]